Supreme Court, U.S.
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No. 03-264

In The
Supreme Court of the United States

JOHN DAVID GEREMIA,

Petitioner,

v.

LAS VEGAS METROPOLITAN POLICE DEPARTMENT, DETECTIVE T. BALL; WILLIAM TULLOS; JOANN TULLOS and WILLIAM MOMA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS LAS VEGAS METROPOLITAN POLICE DEPARTMENT AND DETECTIVE BALL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Whether the Ninth Circuit properly held the actions of an independent entity – either a judge or a district attorney – in issuing warrants or filing criminal complaints insulated Det. Ball in his official and individual capacity from liability under 42 U.S.C. §1983?

2. Whether the Ninth Circuit properly sustained the decision to deny Petitioner's demand for discovery due to its lack of factual support?

3. Whether the only matter properly before the Ninth Circuit Court of Appeals was the denial of the Motion for Reconsideration?

4. Whether Petitioner's Motions for Reconsideration were properly denied?

PARTIES TO THE PROCEEDING

The case caption contains all the known parties to the proceeding.

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CITATION OF OPINION

Appellant's Appendix contains the relevant decision of the Ninth Circuit Court of Appeals entered September 16, 2002 and the appropriate decision of Judge Hagen for this Court to review to determine whether a Writ of Certiorari should issue in this case.

JURISDICTION

On September 16, 2002, the Ninth Circuit Court of Appeals entered an opinion affirming Judge Hagen's decision dismissing this case by summary judgment and denying Petitioner's Motion for Reconsideration. Thereafter, Petitioner timely sought a rehearing en banc by the Ninth Circuit of that decision. Having been so advised, the Ninth Circuit ultimately decided – on March 4, 2003 – to decline the request to reconsider the decision.

Thereafter, Petitioner attempted to bring this matter before this Honorable Court. On August 20, 2003 that matter was docketed with this Court. That date is beyond the requisite 90-day period and, therefore, jurisdiction may not vest. Accordingly, this Petition may be in violation of the time parameters set forth in Supreme Court Rule 13.1. However, it is possible this Court extended the time for filing due to Petitioner's inability to properly format the brief which was before this Court. If an order issued under Supreme Court Rule 13.5, then this concern would be allayed. Otherwise, it would appear the instant Petition is jurisdictionally out of time.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The only constitutional provision at issue in this Petition is the Fourth Amendment which reads:

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

It is respectfully submitted this matter is not one which warrants the consideration or intervention of this Honorable Court. Rather, certiorari should be denied and the Ninth Circuit's decision should be sustained. There are no material errors of law in the Ninth Circuit's decision. Instead, it is a proper and cogent recognition of applicable jurisprudence in this area – in light of established facts.

Pursuant to Supreme Court Rule 14.1(g)(ii) jurisdiction before the Ninth Circuit came from a challenge to the denial of Petitioner's Motion for Reconsideration. After District Court Judge Hagen dismissed the litigation granting summary judgment on two separate motions on June 10th and June 28th, 1999, Petitioner sought reconsideration in the form of two separately filed motions; one filed 21 days after the June 10th Order had been entered and the other 18 days following the June 28th Order.

In declining to reconsider the issue, Judge Hagen noted both of the Motions were brought outside the 10-day

limit. The Judge's Order as to the Motions for Reconsideration being late-filed and his denial of same was entered December 8, 1999. No Notice of Appeal was filed in the case until December 30, 1999.

Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), the Notice of Appeal must be filed with the District Court Clerk within 30 days after the entry of the judgment or order being appealed. If a *timely motion* is filed under Rule 59, then Federal Rule of Appellate Procedure 4(a)(4)(A) tolls the time for the appeal to run. Since the Motions were filed beyond the 10-day limit, the two June decisions could not fall within the ambit of the Ninth Circuit appeal. Instead, the only matter to be properly appealed was the decision by the Judge to deny the Motions for Reconsideration.

That fact notwithstanding, the following is a brief explication of the relevant facts in this case established by the record on appeal.

STATEMENT OF FACTS

The circumstances which allegedly give rise to Petitioner's litigation have their genesis in citizen's complaints and statements made to the LVMPD Laughlin Substation in early June of 1995. These involved a series of actions by Petitioner over a period of time designed to intimidate other individuals. In addition, Detective Ball received a copy of a Protective Order dated July 5, 1995, signed by Judge Moma from Justice Court in Clark County, Nevada. Attached to the Protective Order were instructions to the Sheriff regarding said Protective Order. On that same day,

Detective Ball received a sworn statement from Joann Tullos.

These statements were uniform in their concern about the activities of Petitioner and strongly suggested criminal activity. Upon receipt of these statements, after investigating the matter, Detective Ball prepared a package for reference to the District Attorney's office regarding potential criminal prosecution. On or about July 26, 1995, the District Attorney's office informed Detective Ball the request was denied. On July 28, 1995, Detective Ball cleared and closed the case without any further action.

Afterwards, without consulting Detective Ball (and without any involvement on his behalf) the District Attorney's office filed criminal charges against Petitioner for misdemeanor stalking. An Arrest Warrant was submitted to Judge Moma, signed, and Petitioner was arrested on September 12, 1995.

After his trial on November 30, 1995, Petitioner was convicted on a misdemeanor charge of stalking. On appeal, the conviction was overturned. While it was reset for trial on multiple occasions, the District Attorney's office eventually dismissed the case on its own motion.

During this period of time, the parties who felt they were being threatened by Petitioner continued to submit reports to LVMPD regarding additional events and alleged violations of the Protective Order. The materials were put together and resubmitted to the District Attorney's office; a return request was received from that office for a certified copy of the Protective Order before consideration would be given about going forward on those charges. Upon receipt of the information, on March 14, 1996, the District Attorney's office again submitted a Warrant of

Arrest to Judge Moma which was signed by him. On that same day, Petitioner was arrested on that Warrant and transported to Laughlin, Nevada where he stayed in the detention facility. Even before the Arrest Warrant was submitted, another criminal Complaint was filed by the District Attorney's office. The Complaint was signed by Deputy District Attorney Lynn Robinson. It was ultimately dismissed with prejudice on February 27, 1997.

In April of 1996, Petitioner was involved in a confrontation with coaches of a softball team of which his daughter was a member. As a result, additional complaints and statements were provided to LVMPD regarding that event. Two of the Complaints were sworn statements against Petitioner for harassment. There was also an Incident Report prepared on May 14, 1996, listing Beverly Frietas and Lisa Marie Hackney as victims. This matter was packaged and submitted to the District Attorney's office for consideration. In addition, the District Attorney's office received an Order for Protection issued by the Justice Court on May 14, 1996 on behalf of Ms. Frietas and Ms. Hackney. On May 24, 1996, the District Attorney's office denied prosecution of the matter stating it lacked prosecutorial merit. Detective Ball again closed out his file on July 17, 1996.

Each time the matter became one which was the subject of a Criminal Complaint, Detective Ball was unaware of such decisions. Detective Ball's only involvement was the receipt and submission of these concerns to the District Attorney's office. The decision to prosecute was independently made by the District Attorney's office. It was their choice to seek arrest warrants and they were the sole preparers and signators of the criminal Complaints. In fact, the only way Detective Ball became aware of the

intent to prosecute by the District Attorney's office was when he was confronted by Petitioner's spouse at the substation.

These facts, substantiated by valid evidence, formed the basis for the District Court to grant summary judgment. They were also, apparently, relied upon by the Ninth Circuit in sustaining the decision of Judge Hagen. On this Petition, it is respectfully submitted a different result should not be obtained.

LEGAL ANALYSIS

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED AS TO DETECTIVE BALL IN HIS INDIVIDUAL AND OFFICIAL CAPACITY

A. THERE WAS NO BASIS FOR OFFICIAL CAPACITY LIABILITY

Assuming arguendo this Honorable Court wishes to examine in greater detail the actions of LVMPD and Detective Ball – in the context of the original granting of the Motions for Summary Judgment – Respondents submit Judge Hagen was still correct in the actions which he undertook. An official capacity suit requires a deprivation come directly from a plan or policy of the state, municipality or political subdivision. *Jones v. Smith*, 784 F.2d 149, 152 (2nd Cir. 1986). It is viable only when the underlying governmental entity is the moving force behind the constitutional deprivation. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In other words, the governmental entity's "policy or custom" must have "caused" the violation of federal law or rights. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

It cannot be gainsaid there is *no* liability under §1983 based on respondeat superior or vicarious liability. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691 (1978). "It is only when 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under §1983." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Therefore, the first inquiry in any case which alleges municipal liability under §1983 is whether a direct causal link exists between a municipal policy or custom and the alleged constitutional deprivation. *Id.*

The task of establishing municipal liability is not an easy one. The policy or custom must be a deliberate or conscious choice by a municipality's final policy-making official. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). "While the municipality's failure to adopt a precaution can be the basis for §1983 liability, such omission must amount to an intentional choice, not merely an unintentionally negligent oversight." *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992). However, the failure of a municipality to adopt a policy cannot constitute an intentional choice unless it can be said the city was "deliberately indifferent." *City of Canton*, 489 U.S. at 390. This deliberate indifference is found only when it is obvious the likely consequences of not adopting a policy will be a deprivation of constitutional rights. *Id.*

Ordinarily, inadequate training alone is not the moving force of injury because the police officer who "causes" the injury does not rely upon inadequate training as tacit approval of his conduct. *Palmer v. City of Antonio*, 810 F.2d 514, 516 (5th Cir. 1987). In addition, merely proving an isolated incident is insufficient to show that a custom exists. "Isolated violations are not persistent, often repeated, constant violations that constitute custom and

policy." *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). Conclusory allegations of grossly inadequate training do not make out a case of a deliberately indifferent policy. In order to be a policy, inadequate training must be the product of conscious choice. *Oklahoma City*, 471 U.S. at 824 n.7.

The focus must be on the adequacy of the training program in relation to the task the particular officers must perform. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91.

> It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

489 U.S. at 391. In other words, one must query whether the injury would have definitely been avoided had the employee been trained under a program that was not deficient in the identified respect. *Id.*

In this case, no evidence presented to Judge Hagen indicated proof of any official plan, policy, custom or scheme which could, in any way, constitute a moving force behind any alleged constitutional violation. There was simply no evidence presented of inadequate supervision or training of Detective Ball. In fact, the evidence clearly indicates any prosecution of Petitioner was done based on third-party statements (which were not solicited by Detective Ball) which resulted in an independent decision by the District Attorney's office to prosecute. None of these events rose to the level of a constitutional violation.

Even if an underlying constitutional violation could be shown, that fact alone fails to create a basis for municipal liability. At best, Petitioner's arguments establish an isolated event which is, as a matter of law, insufficient to establish an official capacity claim. The evidence revealed Detective Ball took reasonable steps throughout each stage of his investigations; he collected the relevant evidence presented to him; he determined probable cause existed; and then he turned his investigation over to the Clark County District Attorney's office for further review.

Petitioner was further unable to establish any evidence of inadequate training, supervision or discipline. In fact, Detective Ball specifically testified he had extensive training in stalking cases. When stalking became a nationally recognized crime, LVMPD offered even more extensive classes and provided the officers with regular updates when there were changes in the relevant laws. *Id.* Accordingly, there is simply no evidence upon which to establish a claim for inadequate training or supervision.

Finally, Judge Hagen properly held punitive damages could not be raised against a municipal defendant such as

LVMPD or Detective Ball (in his official capacity). *See City of Newport v. Fact Concepts, Inc.*, 453 U.S. 247 (1981). This prohibition against punitive damages exists not only as to the federal claim but also in the state claims. *See* N.R.S. 41.035. Therefore, Judge Hagen properly held no official capacity claim existed in this case and that punitive damages, as a matter of law, should be dismissed against LVMPD in the 42 U.S.C. §1983 setting and against both Detective Ball and LVMPD in the state law claims.

B. THERE IS NO BASIS FOR INDIVIDUAL CAPACITY LIABILITY

On June 30, 1999, Judge Hagen disposed of the individual capacity claims against Detective Ball. This decision was absolutely correct. There were no valid grounds for individual capacity liability. That result should not change.

In this case, Judge Hagen determined Detective Ball was entitled to qualified immunity. Qualified immunity provides officers with an additional layer of protection against civil liability. *Anderson v. Creighton*, 483 U.S. 635 (1987). It is available to government officials if they could reasonably have thought their acts were lawful in light of clearly established law and the information they possessed. *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 706 (9th Cir. 1989). Officials will be immune unless "the law clearly proscribed the actions" which they performed. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Qualified immunity is designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

Developed to protect public employees from suits and individual liability in the discharge of their public duties, it was designed as a compromise "struck across the board because of the 'substantial social costs, including the risk that fear of personal monetary liability and harassing will unduly inhibit officials in the discharge of their duties.'" *Anderson*, 483 U.S. at 638 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982)). Wholly *objective* in nature, this test is not dependent upon subjective intent. *Kentucky*, 473 U.S. at 166-67; *Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986).

In determining whether qualified immunity applies in the present case, *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991) provides the test:

> The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer of his constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue.

Applying this test to the present case, Detective Ball was entitled to qualified immunity.

Petitioner attempted to identify two rights which were allegedly violated by Detective Ball. First, he argued his Fourth Amendment rights against unreasonable seizures were violated and he claimed a "right" to a full police investigation. The latter claim, as noted by the Judge, was not a recognized right under the Constitution nor was it considered a viable cause of action. Judge Hagen properly held the more amorphous claim of the right to a "full

investigation" – because it was not fully explicated – was not a clearly established right.[1] Thus, to the extent a "failure to fully investigate" claim existed, Judge Hagen properly held Detective Ball was entitled to qualified immunity.

The last remaining issue was whether a reasonable officer would have believed the particular conduct at issue was lawful. Detective Ball made three separate submissions based on the independent reports of third parties who felt they had been personally harassed by Petitioner. Detective Ball's referral to the District Attorney's office for these cases was predicated on the fact that he believed probable cause existed.

"Probable cause exists if the facts and circumstances known to the officers the moment of the arrest would warrant a prudent man in believing that a felony had been committed by the person arrested." *Gordon v. State*, 67 Nev. 177, 426 P.2d 424, 425 (1967); *see Wyatt v. State*, 86 Nev. 294, 468 P.2d 338, 341 (1970) (citing *Draper v. United States*, 358 U.S. 307, 313 (1959)).

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[1] This Court, in *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979), refused to impose a constitutional duty on an officer to engage in a thorough investigation of every suspect who asserts innocence. *See also Thompson v. Olson*, 798 F.2d 552, 556 (1st Cir.), *cert. denied*, 480 U.S. 908 (1987). The Seventh Circuit noted while good police practice may require interviews of all available witnesses, "the Constitution does not require police to follow the best recommended practices." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 442 (7th Cir. 1986). At best, Petitioner argued for a negligent investigation which, as Judge Hagen properly noted, fails to rise to the level of a constitutional claim. *See Daniel v. Williams*, 474 U.S. 327 (1986); *Romero v. Stover*, 45 F.3d 1472, 1478 (10th Cir. 1995); *Herrera v. Millsap*, 862 F.2d 1157, 1160 (5th Cir. 1989).

> A police officer has immunity if he arrests with probable cause. As Chief Justice Warren put it, "A policeman's lot is not so unhappy that he must choose between dereliction of his duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." The immunity in performing such a discretionary function as arresting or detaining a suspect is established by an objective standard, not by an examination of the subjective state of mind of the officer.

Hutchinson v. Grant, 796 F.2d 288, 290 (9th Cir. 1986) (citations omitted). The requirement is not one of absolute certainty but rather a fair probability that the arrestee had committed the crime. *United States v. Potter*, 895 F.2d 1231, 1233-34 (9th Cir.), *cert. denied*, 497 U.S. 1008 (1990). In determining whether probable cause exists, law enforcement officers may draw upon their expertise and experience. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989).

Even seemingly innocent conduct may provide the basis for probable cause when viewed in light of all the information known at the time of the seizure. *United States v. Rodriguez*, 869 F.2d 479, 483 (9th Cir. 1989). *See also United States v. Milner*, 962 F.2d 908 (9th Cir. 1992) (the experience, special training, and expertise of the officers may be considered in determining the existence of probable cause). Prior arrests and convictions can help to establish probable cause, especially where the previous arrest or conviction involves a crime of the same general nature. *See United States v. Conley*, 4 F.3d 1200, 1207 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1177 (1994). The duty of the Court, faced with certain facts, is to determine whether the facts available to the officer at the moment of the arrest would establish such probable cause. *Pendergrast v. United*

States, 416 F.2d 776, 783-84 (D.C. Cir. 1969). In this case, as to each arrest, Judge Hagen held the actions of Detective Ball were appropriate.

The statements by independent witnesses who claimed to be victims or witnesses were sufficient to establish a reasonable person's belief that a crime may well have been in the process of being committed and that Petitioner may have been the instigator of such a crime. While Petitioner may ultimately disagree with the truthfulness of those statements or the dispassionate interest of the witnesses, that disagreement alone is insufficient to destroy probable cause.

More importantly, *Smiddy v. Varney*, 665 F.2d 261, 266-67 (9th Cir. 1981), played an important role in this case, holding the independent decision by the District Attorney's office to file a criminal complaint was considered an intervening act sufficient to immunize both the police officers and the Department from liability.

> Filing of a criminal complaint immunized investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining the probable cause for an accused's arrest exists at that time. . . . Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted . . . a police officer's lot is already unfortunate because it is he who often is the only actor in a chain of decisions

> leading to prosecution who is subject to §1983 liability. We need not make it more unfortunate by holding the officer liable for damages that is the result of the intervening fault of others in the chain.

See Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989); *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979); *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977); *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977). This intervening act further insulated Detective Ball from liability and, therefore, summary judgment was appropriate.

The only remaining cause of action in this regard was the characterization of these events as a state law malicious prosecution. Normally, malicious prosecution claims are not cognizable under §1983 if process is available within the state judicial system to provide a remedy. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Before the court may decide whether a prosecution was conducted with the intent to deprive an individual of his constitutional rights, however, it must first decide whether such a claim has been established under the applicable state law. In Nevada, the prima facie elements of the tort of malicious prosecution are: (1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) favorable termination of the litigation; and (4) resulting damage. *See Chapman v. City of Reno*, 85 Nev. 365, 369, 455 P.2d 618, 620 (1969). In this case, probable cause clearly existed. Therefore, the tort for a malicious prosecution claim would automatically fold. More importantly, there was no evidence of malice on the part of Detective Ball or LVMPD. Instead, the evidence reflects Detective Ball took reasonable steps to collect the evidence and determine probable cause existed before he turned the matter over for further review to the Clark County District

Attorney's office. Based on these facts and the relevant law, there is no question that Detective Ball was entitled to judgment in his favor.[2]

II. PETITIONER NEVER ESTABLISHED PROPER GROUNDS TO REFUSE SUMMARY JUDGMENT UNDER FRCP 56(f)

Petitioner asserts he needed additional discovery. Indeed, most of his issues presented for review submitted to this Court deal with the issue of discovery. However, while Petitioner informed the District Court Judge and the Ninth Circuit he felt he was entitled to additional discovery, the record was clear Petitioner did *nothing* during the discovery period to identify experts or to conduct any discovery. Furthermore, he provided no affidavit and submitted no evidence which would support a decision to withhold summary judgment on the grounds of FRCP 56(f).

While Rule 56(f) is designed to ensure a party has an opportunity to prove his case, where sufficient time for discovery or discovery itself has been allowed for a plaintiff to substantiate his claims, a mere argument that no facts presently exist has been held to be insufficient. *See First Nat'l Bank of Arizona v. City's Service Co.*, 391 U.S. 253, 88 S. Ct. 1575 (1968). More importantly, courts have

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[2] Judge Hagen also noted Petitioner claimed he was entitled to additional discovery. However, the discovery cut-off had already passed. Appellant did nothing to identify experts or to conduct additional discovery. Moreover, he did not meet the requirements of F.R.C.P. 56(f) in making such a request and, therefore, the Judge correctly denied this aspect of his Opposition.

held the party opposing summary judgment must show (1) what facts are involved, (2) why they are known exclusively to the other party, and (3) what steps have been taken to access them. *See Channel Master Satellite Sys., Inc. v. JFD Electronics Corp.*, 748 F. Supp. 373, 395 (D.N.C. 1990). Subsection (f) is not a shield that can be raised to block summary judgment without some showing the opposing party's position is meritorious. *Bakerrink v. Orthopedic Assocs.*, 94 Nev. 428, 431, 581 P.2d 9 (1978).

The court should only permit discovery if it appears from the *affidavits* filed the party opposing the summary judgment could not, for reasons stated, present facts essential to justify the opposition. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987). "Courts will deny Rule 56(f) discovery applications where the moving party's evidence affirmatively negates the factual issues which the opposing party claims remain controverted." *Id.* The burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show the evidence sought exists. *Id.*; *Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986). Clearly, one may not defer consideration of a motion for summary judgment pending further discovery where the facts which the non-moving party wishes to discover would not preclude summary judgment. *Vote v. United States*, 753 F. Supp. 866 (D. Nev. 1990), *aff'd*, 930 F.2d 31 (9th Cir. 1991); *accord Monahan v. Wolff*, 585 F. Supp. 1198, 1201 (D. Nev. 1984).

In this case, Petitioner failed to explain to any court what facts were being sought and how they were to be obtained, how those factual reasons could be expected to create a genuine issue of material fact, what efforts Petitioner made to obtain those facts and why he was not

successful in those efforts. *See Hudson River Sloop Clearwater, Inc. v. Dept. of Navy*, 891 F.2d 414, 422 (2nd Cir. 1989). His failure to do so was fatal to his request.

More importantly, he failed to attach the affidavit required by Rule 56(f). The failure to comply with this aspect of Rule 56(f) vitiates the request thereunder. *See Radich v. Goode*, 886 F.2d 1391, 1393-95 (3rd Cir. 1989). A simple request for discovery in a memorandum is no substitute for the requisite Rule 56(f) affidavit. *Armoteck Industries, Inc. v. Freedman*, 790 F. Supp. 383, 395 (D. Conn. 1992). The failure to comply with these technical yet important provisions of Rule 56(f) renders his request, *ab initio*, invalid. Therefore, Petitioner's complaint that Rule 56(f) should have provided him a shield from summary judgment is fallow.

III. DENIAL OF THE MOTION FOR RECONSIDERATION WAS JUSTIFIED

Finally, the only matter to be appealed is whether the Motions for Reconsideration were properly denied.

Although the term "Motion for Reconsideration" is not mentioned in the Federal Rules of Civil Procedure, the motion is not uncommon in Federal practice. "Reconsideration, as generally used, is a reconsideration by the same Court at which the original determination was made." *Above-The-Belt, Inc. v. Merrill Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

> The motion for reconsideration would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error

> not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Id.

There is no question that reconsideration can be sought pursuant to F.R.C.P. 59(e). However, to avoid being frivolous, the motion must provide a valid ground for reconsideration. *NGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 505 (9th Cir. 1986). It must do two things: "First, it must demonstrate some reason why the Court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision." *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Hawaii 1987).

Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct a clear error or prevent manifest injustice. *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. CA 1986); *see Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1988). It is inappropriate for a party bringing a Motion for Reconsideration before the Court to simply rehash the same arguments in the original briefing found inadequate by the Court. *Settino v. City of Chicago*, 642 F. Supp. 755, 760 (N.D. Ill. 1986).

To the extent new evidence is submitted, an explanation must be given as to why such evidence was not provided in the original submission. *Publishers Resource v. Walker-Davis Publications*, 762 F.2d 557, 561 (7th Cir.

1985). Indeed, the movant is **obliged** to show not only this evidence was newly discovered or unknown until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the original hearing. *Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). If the proffered evidence was available before disposition of Summary Judgment, then the movant is not entitled to reconsideration based upon that evidence. *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1557-58 n.4 (9th Cir. 1987).

Petitioner's Motions for Reconsideration presented no new law or evidence which could not have been presented prior to dismissal. He showed no reason as to why, if any additional facts were available to clarify his position, they were not raised before the Court in opposing the Motion for Summary Judgment. Clearly, Petitioner failed to meet any of those goals and therefore a refusal to consider his regurgitated pablum was appropriate.

CONCLUSION

For the foregoing reasons this Court is respectfully requested to deny Petitioner's request for Writ of Certiorari and, instead, allow the Ninth Circuit decision to stand unmolested.

Respectfully submitted this 17th day of September, 2003.

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